

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1970

No. 345

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UNITED STATES OF AMERICA,

*Appellant,*

—v.—

DONALD FREED and SHIRLEY JEAN SUTHERLAND

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

No. 4846-CD

THE UNITED STATES

v.

DONALD FREED, SHIRLEY JEAN SUTHERLAND

DOCKET ENTRIES

DATE	PROCEEDINGS
10/15/69	<p>Ent ord for fig Indict &amp; fxg bail at \$25,000.00 Personal Surety with 10% (\$2,500.00 Cash) Cash Deposit as to deft Freed &amp; at \$15,000.00 as to deft Sutherland. Fld Indict. Md. JS-2 (S for CC).</p> <p>Fld \$25,000.00 Personal Surety with \$2,500.00 Cash Deposit Bond posted 10/3/69 bef U. S. Commr. Venetta S. Tassopulos at L.A., Calif. Fld Not of Flg Bond as to deft Donald Freed.</p> <p>Fld \$15,000.00 NACIC Bond posted 10/2/69 bef U. S. Commr. Venetta S. Tassopulos at L.A., Calif. Fld Not of Flg Bond as to deft Shirley Jean Sutherland.</p>
11/ 3/69	<p>Ct appts Robt. S. White as cnsl for deft Freed. Fld appear prae as to Luke McKissack for deft Sutherland. Fld waiver of deft Sutherland's presence. Deft Freed not appearg, ord A/P cont to 11/24/69, 9:00 am as to both defts. (CC)</p>
11/24/69	<p>Defts both pres with cnsl. Atty Frank Pestana appears for Atty Hugh Mannis. Atty Alan Saltzman appears for atty Luke McKissack. On mot both defts, Ord case cont to 12/1/69, 9 am for A/P. (CC)</p>

## DOCKET ENTRIES

DATE	PROCEEDINGS
12/ 1/69	Both defts & cnsl present. Defts Freed & Sutherland plead Not Guilty to both counts as chgd. Court ords case as to both defts assigned to the cal of Judge Ferguson at 1:30 PM this date for all fur procs. (CC)
12/ 1/69	Ent procs, Ct ords Jury Trial set for 2/24/70, 10 am. Fld waiver of deft Freed's presence. Fld des of cnsl & Appear prae of atty Hugh Manes for deft Freed. Ct ords hv to 1/12/70 to file any mots & govt hv to 2/2/70, to respond & hrg on mots set for 2/9/70, 11 AM (F)
12/ 9/69	Fld Mot & Not of Mot of deft Freed retnble 12/12/69, 1:30 PM bef (F) for reduction of bail, affid of Hugh R. Manes & Memo of pts & auths in suppt.
12/11/69	Fld Pltf's oppos to deft Freed's Mot for reduction of bail and affid of Henry J. Novak, Jr. in suppt thereof; with affid.
12/12/69	Ent prcdgs, after argument, Court ords deft Freed's motn for reduction of bond denied. (F)
1/12/70	Fld Mot of both defts Freed & Sutherland for Bill of Particulars and supporting Memo of pts & auths retnble 2/9/70, 11 AM bef (F).
	Fld Mot of both defts Freed & Sutherland for Discovery and supporting Memo of pts & auths purs Rule 16 FRCP retnble 2/9/70, 11 AM bef (F).
	Fld Mot of deft Freed to suppress evidence illegally seized and Memo of Law in suppt thereof retnble 2/9/70, 11 AM bef (F).
	Fld affid of deft Freed in suppt of Mot to suppress evidence, with exbt "A" attached thereto.

## DOCKET ENTRIES

DATE	PROCEEDINGS
1/13/70	Fld defts' Note of Mot to dismiss, suppress evidence, discovery & for bill of particulars, returned 2/9/70, 11 am before (F). Fld defts' Mot to dismiss; filed memo in support thereof.  Fld defts' Mot to suppress and return items seized to their rightful owner; memo of points & authorities & affidavit & supporting affidavit in support.
2/ 2/70	Fld Mot for extension of time for filing response to pre-trial motions & order (WF) thereon, giving plaintiff until Friday, 2/6/70, to file response to defts' pre-trial motions.
2/ 2/70	Fld plaintiff's opposition to defts' motions to dismiss indictment.
2/ 4/70	Fld plaintiff's opposition to motion to suppress with 2 affidavits in support thereof.
2/ 6/70	Fld Plaintiff's response and opposition to Motion for Discovery and inspection.  Fld Plaintiff's Combined Bill of Particulars and opposition to defts' Mot for Bill of Particulars pursuant to 7(f) FRCP.
2/ 9/70	Ent proceedings, Court orders hearing on deft's Motions continued to 2/16/70, 11 am for hearing (F)
2/12/70	Fld deft's reply memo in support of motion to dismiss.
2/16/70	Ent proceedings hearing deft's motion for Bill of Particulars, for discovery & to dismiss, to suppress evidence & for return of seized property & Ent order granting motion to dismiss indictment as to both defts. Atty Manes to prepare formal order of dismissal Ent order continued to 2/27/70, 1:30 pm for presentation of order for dismissal. (F)
2/27/70	Fld Ex Parte Motion for continuance of hearing & Order (HP) continued hearing to 3/6/70, 1:30 PM as to both defts. (HP for F).

## DOCKET ENTRIES

DATE	PROCEEDINGS
3/ 6/70	Ent procs hrg re ord of dismissal. Cnsl deft's present proposed ord of dismissal to the Ct & Ct ords matter submitted. (HP for F)
3/ 9/70	Fld Pltf's Supplemental Memo of fact.
3/10/70	Fld Order (F) dismissing Indictment as to both defts Donald Freed & Shirley Jean Sutherland. Ent. 3/10/70. Md JS-3 as to both defts. (F).
4/ 7/70	Fld pltf's Notice of Appeal & issd cys to defts' cnsl, U.S. Atty, (F), jury clerk, file. Flg fee waived. Notice of Appeal re dismissal of case against both defts Freed & Sutherland, ent 3/10/70.

[Filed Oct. 16, 1969]

UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA  
September 1969 Grand Jury

No. 4846 CD

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

DONALD FREED, SHIRLEY JEAN SUTHERLAND, DEFENDANTS

INDICTMENT

[18 U.S.C. § 371: Conspiracy; 26 U.S.C. § 5861(d) :  
Possession of Unregistered Destructive Device;  
18 U.S.C. § 2: Aiding and Abetting]

The Grand Jury charges:

COUNT ONE  
[18 U.S.C. § 371]

Commencing on or about October 1, 1969, and continuing until the date of the filing of this indictment, in the Central District of California, defendants DONALD FREED and SHIRLEY JEAN SUTHERLAND, wilfully and knowingly combined, conspired, confederated and agreed, together and with each other, and with divers other persons whose names are unknown to the Grand Jury, to commit an offense against the United States, that is, to possess destructive devices, to wit: a number of hand grenades, which hand grenades had not been registered to them with the Secretary of the Treasury or his delegate as required by Section 5841(c), Title 26, United States Code, in violation of Section 5861(d), Title 26, United States Code.

At the times hereinafter mentioned, the defendants committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On or about October 1, 1969, in the Central District of California, defendant DONALD FREED held a conversation with an undercover officer of the Los Angeles Police Department at John Brown Bookstore, 13526½ Van Nuys Blvd., Pacoima, California.

2. On or about October 1, 1969, in the Central District of California; defendant DONALD FREED placed a telephone call from a phone booth in Pacoima, California, to the defendant SHIRLEY JEAN SUTHERLAND.

3. On or about October 1, 1969, in the Central District of California, defendant DONALD FREED gave the heretofore mentioned undercover officer of the Los Angeles Police Department a phone number at which defendant DONALD FREED told him to call defendant SHIRLEY JEAN SUTHERLAND.

4. On or about October 1, 1969, in the Central District of California, defendant SHIRLEY JEAN SUTHERLAND held a telephone conversation with the heretofore mentioned undercover officer of the Los Angeles Police Department from a telephone booth in Beverly Hills, California.

5. On or about October 1, 1969, in the Central District of California, defendant SHIRLEY JEAN SUTHERLAND held a second telephone conversation with the heretofore mentioned undercover officer of the Los Angeles Police Department from a phone booth in Beverly Hills, California.

6. On or about October 2, 1969, in the Central District of California, defendant SHIRLEY JEAN SUTHERLAND held a telephone conversation with the heretofore mentioned undercover officer of the Los Angeles Police Department from a telephone booth in Beverly Hills, California.

7. On or about October 2, 1969, in the Central District of California, defendant DONALD FREED held a telephone conversation with the heretofore mentioned undercover officer of the Los Angeles Police Department from his apartment at 1825 Beloit Street, West Los Angeles, California.

8. On or about October 2, 1969, in the Central District of California, defendant SHIRLEY JEAN SUTHER-

LAND placed and caused to be placed one hundred dollars (\$100) in the mail box at her residence, 1144 Tower Road, Beverly Hills, California, in payment for a number of destructive devices, to wit: hand grenades.

9. On or about October 2, 1969, in the Central District of California, defendant DONALD FREED tendered a one hundred dollar (\$100) check in payment for a number of destructive devices, to wit: hand grenades.

10. On or about October 2, 1969, in the Central District of California, defendant DONALD FREED possessed a number of destructive devices, to wit: hand grenades.

#### COUNT TWO

[26 U.S.C. § 5861(d), 18 U.S.C. § 2]

On or about October 2, 1969, in the Central District of California, defendant DONALD FREED possessed a number of destructive devices, to wit: hand grenades, which had not been registered to him with the Secretary of the Treasury or his delegate as required by Section 5841(e), Title 26, United States Code.

At said time and place, defendant SHIRLEY JEAN SUTHERLAND aided, abetted, counseled, induced, and procured the commission of the offense alleged above.

WM. MATTHEW BYRNE, JR.

A TRUE BILL

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Foreman

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United States Attorney



[Filed Jan. 13, 1970]

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

No. 4846 CD

UNITED STATES OF AMERICA, PLAINTIFF

*vs.*

DONALD FREED, SHIRLEY JEAN SUTHERLAND, DEFENDANTS

MOTION TO DISMISS INDICTMENT

Defendants, DONALD FREED and SHIRLEY JEAN SUTHERLAND, through their attorneys, LUKE McKISSACK and HUGH R. MANES, move the Court pursuant to Rule 12(6) Federal Rules of Criminal Procedure, for an Order dismissing the Indictment on the following grounds:

(a) The Court has no jurisdiction of the offenses charged in either count of the Indictment for the reason that Sections 5841(c) and 5861(d), Title 26, United States Code, and each of them on their face and as construed by the indictment herein are unconstitutional and deprive the defendants of due process of law guaranteed by the Fifth Amendment to the United States Constitution;

(b) The Court has no jurisdiction of the offenses charged in either Count of the Indictment for the reason that Sections 5841(c) and 5861(d), Title 26, United States Code compel defendants to incriminate themselves contrary to the guarantees of the Fifth Amendment to the United States Constitution;

(c) The Court has no jurisdiction of the offenses charged in either count of the Indictment for the reason that the statutes charged therein on their face and as construed by the Indictment herein are vague, indefinite, ambiguous and uncertain, and deprive defendants of due

process of law guaranteed by the Fifth Amendment to the United States Constitution;

(d) The Indictment and each count thereof fail to state a public offense and is vague, indefinite, uncertain and ambiguous, in that it and each count thereof fails to state each essential of the offense alleged and deprives defendants of due process of law guaranteed by the Fifth Amendment and a fair trial guaranteed by the Sixth Amendment.

DATED: January 12, 1970.

HUGH R. MANES  
Attorney for Defendant,  
Donald Freed  
LUKE MCKISSACK  
Attorney for Defendant,  
Shirley Jean Sutherland

By /s/ Martha Goldin  
MARTHA GOLDIN  
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

No. 4846-Criminal

UNITED STATES OF AMERICA, PLAINTIFF

*vs.*

DONALD FREED, SHIRLEY JEAN SUTHERLAND, DEFENDANTS

Transcript of proceedings before the Hon. Warren J. Ferguson on Monday, February 16, 1970, commencing at 10:00 A.M.

APPEARANCES:

For the Plaintiff:

WM. MATTHEW BYREN, JR.  
United States Attorney

By: DENNIS KINNAIRD  
Assistant United States Attorney

For the Defendant Freed:

HUGH MANES, ESQ.  
3440 Wilshire Boulevard  
Los Angeles, California

For the Defendant Sutherland:

LUKE MCKISSACK, ESQ.  
1725 Ivar  
Los Angeles, California

LOS ANGELES, CALIFORNIA, MONDAY,  
FEBRUARY 16, 1970, 2:00 P.M.

• • • •

THE CLERK: No. 10 on the calendar, case No. 4846-Criminal, United States of America versus Donald Freed and Shirley Jean Sutherland, hearing defendants' motions.

MR. KINNAIRD: Dennis Kinnaird for the Government, your Honor.

MR. MANES: Hugh Manes for the defendant Freed.

MR. McKISSACK: Luke McKissack for the defendant Sutherland, your Honor.

. . . . .

THE CLERK: No. 4846-Criminal, United States of America versus Donald Freed and Shirley Jean Sutherland.

THE COURT: I will hear from Mr. Manes.

MR. MANES: May it please the Court, on the motion to dismiss, if the Court please, I would like to address myself to that somewhat briefly as the first item of business.

This motion, your Honor, is directed essentially to two aspects of the Indictment which charges in Count One a conspiracy and Count Two possession of ten hand grenades in violation of the registration requirements of the Weapons Control Act of 1968.

Of course a great deal of our argument has been made already in the Hanes case, your Honor, and as we have tried to point out in our memorandum—

THE COURT: What are you going to do about the cases that say that fingerprints and photographs do not come within the purview of self-incrimination.

MR. MANES: Well, more than fingerprints and photographs are required here, your Honor.

THE COURT: What about the cases that say an address is not—

MR. MANES: But the most essential thing, your Honor, that we are faced with here—

THE COURT: I would like you to address yourself to the Court's question.

MR. MANES: Well, that is what I am doing, I am doing that.

THE COURT: All right.

MR. MANES: I am saying that the information conveyed to the transferor by the transferee indicates that the transferee is going to be in possession of some weapons in violation of 2301 to 03 of the—

THE COURT: Yes, but the transferee doesn't have to do that. The transferor can look in the phone book and get his name and address.

MR. MANES: But the information is going to be in the national registry. And the information in the national registry which authorizes a transfer from the transferor to the transferee is going to indicate that such a possession on the part of the transferee is in violation of State law of California.

And so the combination of fingerprints, address and photographs and other information—and incidentally I might point out that the regulations themselves require more than simply that information, your Honor. They also require an affidavit.

If I may, your Honor, allude for the moment to 26 CFR, Section 178.98, it would appear that the Secretary has required that sales or delivery by a licensee of destructive devices to a non-licensee is prohibited unless such person—and I presume the Secretary means the non-licensee—furnishes an affidavit setting forth reasonable—

THE COURT: You mean 179.98.

MR. MANES: I beg your pardon?

THE COURT: You mean 179.98.

MR. MANES: No, your Honor. I meant 178.9, according to my notes.

THE COURT: All right.

MR. MANES: There is a 179.98 also which makes reference. But the one I mean, the one I am reading appears to be an affidavit required to be presented by the non-licensee setting forth the necessity for his acquisition of the weapon, and that possession would be consistent with public safety. It doesn't obviate the requirement of the transfer being approved, but it just supplements it.

Of course I think that the main point here, your Honor, is that by whatever means the information is conveyed through the transferor, the fact that the transferee's name will appear on the register will immediately subject the transferee to State prosecution in California under 123.23 of the Penal Code—12303 of the Penal Code.

And as I see the case here, in light of Hanes, the only difference really between this and the Hanes case is that here, instead of the transferor—or rather the transferee being the registering party it is the transferor. But in essence he is providing the requisite information for prosecution, for the Government.

THE COURT: How does that violate the transferor's self-incrimination?

MR. MANES: Because it is information—

THE COURT: When it was somebody else who furnished the information.

MR. MANES: Because the transferor is acting as agent of the Government in this sense. And ~~when~~ the transferee is conveying information to the transferor he is, in effect, giving the Government—through its agent—namely the transferor, information to make it possible for him to be prosecuted under the law. As a matter of fact they are even providing the Government with a ready-made witness because they are making him a party to the transfer, who will then become the Government's witness to the transaction.

So I really—I find it difficult, your Honor, to escape the implications of Hanes, just simply because they have set up an intermediary or a conduit for the transfer of this information. Otherwise you have the exact same statute that you have in Hanes.

I don't know that we can add much more to the points which we have set out in our memorandum. But I think that there is one other argument in this case, and that is tied into the knowledge argument that we make in another part of our memorandum. And here of course we find an indictment which, with the statute, fails to make an allegation of knowledgeable possession.

Now, I know that the thought is how can one who has possession of a submachine gun or grenade, or some other weapon, not know that he has got a weapon in his possession. But let me suggest to your Honor the facts of a hypothetical case which very closely approximates this one, where an accused received from a Government agent a box which, unbeknownst to him, contains unregistered weapons. And these are placed in his possession.

And then within a minute following that transfer he is arrested for possession of these weapons. They are in the box. They are in his possession. But there is no showing that he had any information verbally from the Government agent, or from anyone else, that that is what the box contained.

There is no evidence that he—at least on the face of the indictment—that he had any knowledge that the box contained contraband of some kind.

I have to say, your Honor, that I would find it offensive to due process if the Government could prosecute such a defendant successfully, certainly in the absence of being required to prove that the defendant knew that he was in possession, not of information, but in possession of grenades or other destructive devices which did not meet the registration requirements of the law.

And there is another reason for this feeling that it would be offensive to due process not to require the Government to prove it, and that is the fact that here—

THE COURT: Can you find me a case that says that, a tax case?

MR. MANES: No, I cannot find your Honor a tax case that does.

THE COURT: Only common-law cases that provide—

MR. MANES: I think we have cited to your Honor some other cases, such as the Lambert case. And we have tried to draw an analogy to the Dennis case as examples of the types of cases. I realize that Dennis is a First Amendment case but I don't think that answers the problem of due process necessarily, to say that, oh, well, that is a First Amendment problem.

But I did want to point out, your Honor, that what makes me, what compounds the difficulty here, and what makes it more offensive to due process is this fact, namely, that you have a Government agent, an undercover officer, but nevertheless he obtained the grenades from a Navy arsenal. They are turned over to him by Naval Intelligence.

Now the Government of course is exempt from the registration requirements of the Act until they make a transfer. And when the Government makes a transfer

it is, there is a requirement that they get the approval of the Secretary.

Now, we are told that no such approval was obtained and so we are in the posture therefore of having the Government prosecute the defendant for receipt of weapons which the Government was under a duty to have registered before that transfer was effectuated.

So what you have is an analogy to the kind of due process contentions that are made, you have an analogy to the kind of due process arguments that are given in support of the exclusionary rules in *Matt versus Ohio*, or in cases such as *Richmond versus Rogers*, and in other types of situations where the Court refused to have a part of the "dirty business."

THE COURT: Well, in order to establish that we have to have a trial.

MR. MANES: Well, not necessarily.

THE COURT: You are basing your motion to dismiss the indictment without any facts.

MR. MANES: No, not quite, your Honor, because we do have some response made to our bill of particulars.

The Government has informed us, in response to the bill of particulars, which enlarges but nevertheless becomes a part of the indictment, they have informed us that Mr. Jarrett, the police officer for the Los Angeles Police Department received the weapons, that he received the weapons from the Naval Intelligence office. We know that much.

And we know from the bill of particulars and the response thereto that he, in turn, transferred these weapons to the defendant, the defendant Freed. And that becomes the essence of both of the counts in this case. We know that much.

So therefore if in the allegations of the indictment we find that these weapons are unregistered, then we know that the Government failed in its duty to have them registered before the transfer, and that there is a prima facie case of entrapment, because it simply means that the Government can create the deficiency, that is the failure to comply with the law. The Government, simply by failing to register its weapons before the transfer creates



a situation where the defendant can be, and is not only violating the law, the registration requirements because of the act of the Government, the unlawful act of the Government, but indeed that he does so knowingly, according to the indictment.

I think that in the context of those circumstances, your Honor, it makes an indictment here fatally defective. It seems to me that, certainly in the absence of requirement that it be shown that these defendants at least had notice that he was obtaining a weapon that was being transferred in violation of the Weapons Control Law.

Those are basically the two contentions I want to make.

THE COURT: Mr. Kinnaird?

MR. KINNAIRD: May it please the Court:

On the last question that was raised, the question of entrapment, or the legality of the Government's activity in the prior transfers, we take the position that up to the point of the transfer to Mr. Freed this was a control possession. And the question of entrapment becomes a question of fact, whether or not the Government merely provided a willing seller to a willing and able buyer.

And we believe that when it comes to the merits of the case we will be able to prove beyond a reasonable doubt, as it is our burden, that Mr. Freed was a completely willing buyer and was not entrapped in any sense of the law. We were just providing the—

THE COURT: Well, isn't it true under the law—you are saying that all of the time the grenades were delivered to Mr. Freed that they were in the possession of the Government.

MR. KINNAIRD: Yes, your Honor.

THE COURT: Does the Government, before it can transfer these grenades to somebody, have to get the approval of the Secretary of the Treasury?

MR. KINNAIRD: There is a procedural requirement for an exempted transfer. In this case it is no different, your Honor, than the order form in a narcotic situation where the Government goes out and buys narcotics from a willing buyer not pursuant to the order form. It is the exact situation which you have in both the Minor and Huie case where it was the Government's agent's

obligation to have that order form, to give that order form to protect the seller. The Courts have formerly held that the defendant could be found guilty and could be convicted for the Government's failure to comply with it, not even tendering the order form to him.

THE COURT: But my question is, this is the reverse situation. What if a Government agent sells heroin without all the necessary requirements?

MR. KINNAIRD: If it is a controlled sale, your Honor, and the purpose of the question of law enforcement that we have, your man is not going to be covered from it because a policeman acting in the line of duty, the same as if he was shooting somebody or any other activity is not—

THE COURT: He is not breaking the law then. But in this case he is deliberately breaking the law. If he sells heroin to me—if a Government agent sells heroin to me without complying with the necessary requirements of sale, he has violated the law deliberately.

You are saying that just because he is a police officer he is exempt.

MR. KINNAIRD: If he is acting in the line of duty and was instructed to act, to find out if X wanted to buy heroin and was soliciting the buy of heroin and he decides to give him the opportunity—

THE COURT: Can you show me any kind of a case that permits that?

MR. KINNAIRD: That permits the sale where you have had a situation of sale of an item by the Government?

THE COURT: That says merely because he is acting as a law enforcement officer that that exempts him.

MR. KINNAIRD: And he is acting pursuant, or acting under the authority of a law enforcement officer?

THE COURT: Yes.

MR. KINNAIRD: Well, you have to, you have the exact same situation when you have a narcotic situation because there is a requirement on the buyer and seller both to act.

THE COURT: I am not talking about a buyer. I am talking about a sale.

MR. KINNAIRD: Well, why would the sale, the mere fact of a sale make it entrapment, the total concept of entrapment, the illegality of the police officer, because the question is: whether you are complying—

THE COURT: You are saying then, you are saying then that the transfer to Freed by the Government, the Government did not violate the law because they were acting as the Government?

MR. KINNAIRD: That is correct, your Honor.

THE COURT: All right.

MR. KINNAIRD: And we are acting as the Government in our capacity—

THE COURT: Except when another branch of the Government says you can't do it unless you get my approval.

MR. KINNAIRD: Well, in that sense what they were controlling on the legislative basis of the statute—this point was not per se raised by them, your Honor, in this motion. If your Honor would like the point briefed I would like to do this.

THE COURT: I think it is inherent. I sensed it when I read the briefs.

MR. KINNAIRD: Well, basically, your Honor, the point I—

THE COURT: Let me ask you this question. Let's assume I am walking back from lunch, and let's assume I find in the gutter a hand grenade, and let's assume I picked it up for the purpose of taking it over to the police station to have it destroyed. Do you get the factual situation?

MR. KINNAIRD: Yes, your Honor.

THE COURT: And let's assume that I know I have possession of it because I picked it up.

MR. KINNAIRD: Yes, sir.

THE COURT: And let's assume I knew this was a hand grenade because I could see it. Am I guilty under the statute?

MR. KINNAIRD: I don't believe that your Honor would be.

THE COURT: Why?

MR. KINNAIRD: For the same reason.

THE COURT: Because there wasn't the necessary scienter involved, right?

MR. KINNAIRD: No, your Honor. I don't address myself to scienter. I address myself to public necessity and countervailing public interest that would make an extension of the statute to that point—

THE COURT: Well, let's assume—

MR. KINNAIRD: —which would make it incredible, I would, it would make it unconstitutional to extend the statute to the point where an individual acting scienter of the community by taking a hand grenade and putting it in, the same as picking up a sawed-off shotgun and going in a bank—

THE COURT: Well, we are talking about scienter now, aren't we? A scienter is, you know, bad motive, a bad man.

MR. KINNAIRD: Basically we are talking about illegal—right, the illegal—

THE COURT: Isn't that scienter?

MR. KINNAIRD: Right.

THE COURT: The criminal mind.

MR. KINNAIRD: Yes, your Honor. The state of mind to violate the law.

THE COURT: All right. All right. So you are saying, what you are saying then is a necessary element of the crime for which these defendants are being charged is scienter.

MR. KINNAIRD: No, I am not, your Honor. I am saying that if the statute could be extended to apply to your Honor's hypothetical it would be stretching the statute out basically—

THE COURT: What does the statute say? The statute says anybody who possesses a hand grenade that has not been registered is guilty of a crime for which the penalty is ten years or \$10,000.00 or both.

MR. KINNAIRD: Yes, your Honor.

THE COURT: All right. I am walking down the street, I pick up a grenade, I know it is a grenade and I know it isn't registered. Under the statute—

MR. KINNAIRD: Under the statute you would probably technically be guilty under the statute.

THE COURT: You say that is wrong.

MR. KINNAIRD: Having in possession, with no transfer form attached to it, to pick it up.

THE COURT: Sure.

MR. KINNAIRD: And the reason you would be guilty of it would be the affirmative duty you have not to take possession of a firearm unless it is accompanied by the proper transfer.

THE COURT: So I would have to leave it there.

MR. KINNAIRD: You would have to leave it there.

THE COURT: If I picked it up I could go to prison for ten years.

MR. KINNAIRD: Or—I believe that your Honor could recognize the potential and would never bring that kind of case before the Court—

THE COURT: But you see, that is the law of men, rather than a law of law that we have abolished years ago, haven't we?

MR. KINNAIRD: Well, it reminds me, your Honor, of the quote that I used where they had the law that whoever draws blood on the streets of Ballona shall be severely punished, but the surgeon who is relieving a fit would not be the man subject to it.

THE COURT: Then it all boils down in the final analysis that in order to establish this crime a necessary element is scienter.

MR. KINNAIRD: I disagree that the statute, as the overwhelming case authority on the predecessor statute, and the entire concept of regulatory statutes, your Honor, make any requirement of scienter as being—I knowingly take possession contrary to law—the statement of “contrary to law.”

Now I concede the fact, and as I did in my points and authorities, that the question that you must have knowledge that you are taking a destructive device in your possession is a necessary and logical extension and meaning of the term “possession”—that you know you have in and grenades period. That is what is required.

The question of scienter as they brought out in the Sikes case, and the predecessor statute 5851 which I am sure your Honor has sat on numerous appeals under that 5821, as in the Sikes case they took the position, yes, I

have the gun in my hand but I did not know that this weapon had a barrel less than sixteen inches long, and therefore I did not know it is a firearm, I did not know that it is contraband for me to possess it without registering it. And therefore I should not be found guilty.

The Court has consistently held that, in the case of the National Firearms Control Act, that was taxation legislation, that the knowledge that the weapon must be registered, the knowledge that the weapon is a device as defined by the statute, knowledge of the statute or even of the existence of the law is not a necessary element but is completely immaterial to the regulatory scheme, because if you had this possession in a regulatory scheme, that you must have knowledge that this is a weapon to be registered you would have a natural way out and every violation of it by a person who had not addressed themselves to the question of reading the regulations, the regulatory statutes.

THE COURT: All right.

MR. KINNAIRD: And I have one case in point, your Honor, that I feel is quite close to the theory of what we are talking about. Under Rule 10(b)(5) of the Securities and Exchange Act you can hold a person guilty of a crime which carries a certain penalty, if he has knowledge of the regulation it carries a more extreme penalty. But in both cases it carries a penalty to violate the regulations, under Rule 10(b)(5).

And it goes to the same point as the Courts have numerous times pointed out. The rule of scienter can play a number of different roles in our criminal enforcement. One in the common law, it is generally considered that it has to be there. The Morrisett case lays that out in great detail.

However, they too even recognize that it would be unfeasible to cope with a regulatory statutory scheme and require that the scienter requirement, that they did not dispense with this aspect of the case. And the cases that have followed have consistently held that scienter is not required, not a required element of it.

And so back to the original hypothetical, I changed my position, I recognize that under the statute it would be a

crime, but it is one of those situations that would have to be taken because I believe it is an extension beyond the concept that is necessary for your decision on this.

THE COURT: All right. Let's get back to the transfer by the Government agent.

Under a literal reading of the statute the agent was also guilty, wasn't he? The undercover agent? Because he transferred these hand grenades without obtaining the approval of the Secretary.

MR. KINNAIRD: The transfer was made without the, without obtaining the approval of the Secretary.

THE COURT: And he was guilty.

MR. KINNAIRD: There is a transfer of responsibility. We claim there is an exception based on the exigencies of the situation here, the time requirement, the lack of ability to get it, our duty to correct and arrest a crime as it happens, the fact that—

THE COURT: Are you saying then that—are you saying then that as a defense the transferee has a period of time in which to correct his mistake?

MR. KINNAIRD: No. There is no opportunity for the transferee under this statute—

THE COURT: You said that there wasn't time under this case—

MR. KINNAIRD: I am speaking—

THE COURT: —for the transferor to get permission.

MR. KINNAIRD: I am speaking—

THE COURT: Doesn't the right hand have just as much importance as the left? When the, if the transferor is not guilty if he has time to get permission, why wouldn't that same right pertain to the transferee?

MR. KINNAIRD: Because we have two different interests that we are concerned with, your Honor. And I would like to address myself to that—

THE COURT: The interest, the interest was the interest of transferring hand grenades without the approval of the Secretary of the Treasury. That is the interest involved.

MR. KINNAIRD: Well, the interest is—

THE COURT: Because this is a tax law, isn't it?

MR. KINNAIRD: It is an Internal Revenue Regulation, yes, tax law.



THE COURT: All right.

MR. KINNAIRD: I would like to point out somewhat an analogous situation. A policeman who is fulfilling a lawful duty of his that to-wit being to arrest a person in a criminal activity—

THE COURT: Because the law gives him that right.

MR. KINNAIRD: What provision in the law gives him the right?

THE COURT: The traffic code that says that this is not pertaining to police officers acting in an emergency.

MR. KINNAIRD: Well, if your Honor would like I would like to have the opportunity to brief this specific point in detail, because they did not raise this point. They raised a number of other points that I believe are totally without merit. I would like to have the opportunity to look into this point that your Honor has raised and to attempt to understand exactly—if you are saying that you have a—because if the policeman does not comply with the regulation, or the transferor does not comply with the regulation—

THE COURT: This is the issue—

MR. KINNAIRD: —ever be committed—

THE COURT: This is the issue, this is the issue: Does the Government have a right to punish somebody when the Government violates the law that causes that person to be punished? It is that simple.

Does the Government have the right to punish somebody as a result of the Government's illegal activities?

MR. KINNAIRD: Our position, your Honor, on this point turns on the concept that—

THE COURT: You can't convict somebody when an officer commits an unlawful search and seizure. You can't convict somebody if the officer obtains an involuntary confession.

So what is so sacred about this law in here when the Government voluntarily and with plan and thought violated the law. And now they seek to hold the transferee, they want to punish the transferee.

Does the Government have the right?

MR. KINNAIRD: I think the position that we take, your Honor, is that we are concerned here with a situation



of an individual, which we will be willing to prove at trial, was actually seeking to obtain hand grenades—

THE COURT: Why didn't you prosecute him under the State law? I was going to ask you that question eventually so I might as well ask now.

Why wasn't he prosecuted under State law?

MR. KINNAIRD: Well, your Honor—

THE COURT: This was an investigation that originated and was started by the Los Angeles Police Department.

MR. KINNAIRD: It was a joint investigation, your Honor.

THE COURT: You have got a law in California that prohibits his possession of the hand grenades.

MR. KINNAIRD: Yes, your Honor.

THE COURT: Why didn't you prosecute him under that? Why wasn't he prosecuted under that?

MR. KINNAIRD: I would have to admit, your Honor, that I don't know because I wasn't even involved in the case at that time. And until the motion came in I didn't even know what was going to be involved.

THE COURT: Under that case you have got something else again. You have got entirely different rules to go by.

MR. KINNAIRD: But the decision at some point—and the decision was certainly a great deal more than—I mean higher than my own, it was made that the case would be proceeded upon in Federal Court. And we sought an indictment and brought it here. I honestly can't answer why it was decided it would be brought here. I recognize it could be brought in State Court.

We both have a set of statutes regulating offenses of this nature.

THE COURT: Under the Government's statute it is not illegal to possess a hand grenade. It is illegal to possess a hand grenade that hasn't been registered, or **you haven't obtained the approval of the Secretary of the Treasury.** And that is a big difference.

MR. KINNAIRD: It is illegal, under the Government's position, to take possession of one that has not undergone these activities.

THE COURT: That is what I was saying maybe in a little different words.

MR. KINNAIRD: The only question in back of the basic equities which I understand your Honor is pointing out, we are confronted with a situation where we are faced with people who want to engage in the activity. We have an opportunity, because of the locale and infiltration of the given individual in an organization who can provide this, that has to be done in an extremely short period of time. It is his duty, and it is the duty of the agency with which he works to effectively foreclose any criminal activity on the part of people that he knows desire to do it.

Now the question then boils down to what is our agent, or the police officer on the scene, going to do at that time.

THE COURT: The police officer voluntarily went to the Navy, and the police officer voluntarily obtained from the Navy, and the police officer voluntarily handed over these hand grenades to Freed.

MR. KINNAIRD: But your Honor—

THE COURT: And you say that is all right, there is a great emergency happens—

MR. KINNAIRD: That is correct.

THE COURT: What happens to the great emergency is that they went and got them in the first place.

MR. KINNAIRD: Your Honor, if they don't sell them and he buys them from somebody else we will have no basic ability to ever prosecute him. All we are talking about is more effective police enforcement here. All we are talking about is an approach that indicates a more effective enforcement.

THE COURT: This is the old argument that was always made when we were talking about involuntary confession. This is the old argument that was always made on illegal search and seizure—it is going to interfere with more effective police enforcement.

MR. KINNAIRD: Yes, but—

THE COURT: And the Supreme Court years ago discarded that concept.

MR. KINNAIRD: Yes. But I think they were concerned with much different ideas than what we have today. They were basically concerned with the question of search—on the confession they were concerned with the basic—I think it has gone to the evolution of voluntary

and involuntary, it has gone into the concept of the Miranda warnings and the right to enlighten the unenlightened as to their rights under the Constitution.

The search and seizure laws are exclusionary rules predicated upon the concept of the sanctity of an individual, his privacy, and that the police will not take excessive behavior in invading that privacy. And therefore we will apply the current activity to this.

Those are two methods of controlling the police activity as it affects the given individual.

THE COURT: Isn't that the law of entrapment?

MR. KINNAIRD: Your Honor—

THE COURT: Isn't that the same concept, the law of entrapment?

MR. KINNAIRD: No, your Honor, I don't think so. There are two concepts involved in the law of entrapment and they both go down to the same basis.

The law of entrapment, you have an individual who says basically, I am not a person to have intended to commit this act. And if it had not been for the policeman who implanted the original seed of the activity to me I would not have committed this act.

THE COURT: We are talking about scienter.

MR. KINNAIRD: No, the act of taking hand grenades in this case, your Honor—only taking hand grenades, possession of hand grenades. And the question and the inherent nature of hand grenades give people notice that something is going to be beyond that which they claim to be required.

I would like the opportunity to, if your Honor is going to rule towards the entrapment question, to have an opportunity to brief this at greater length and come back and present an argument as to the numerous policy considerations that would be involved in making a situation that when you have an officer who sells the item, and that officer sells it without complying with the registration, that as a matter of law that constitutes entrapment and there can never be any prosecution, because that would be the impact, I believe, of your Honor's ruling.

THE COURT: No. That would be extremely falacious on my part if I so held.

I raised the issue on the basis of scienter because it all goes back to the final analysis, we are talking about scienter. I don't think that you can get away from it.

MR. KINNAIRD: Your Honor's position is then that—well, I think then that I should—is the scienter requirement—and I only ask this in all respect, your Honor, for my own edification on the point—is it one of knowledge of the law itself, or is it one of just a purpose that is contrary—

THE COURT: No, no, no. Everybody is presumed to know the law. And knowledge of the law I don't think is a necessary element.

But it appears to me that when you take the problems of this case, you take a police officer who goes to the Navy, who gets some hand grenades for the sole purpose of delivering those hand grenades to one of the defendants so that defendant can be arrested and charged with a federal crime. That is the whole purpose of the whole thing.

He didn't give them the hand grenades so they could blow up the City Hall, did he?

MR. KINNAIRD: Well—

THE COURT: Or maybe he did, I don't know.

MR. KINNAIRD: Well, inherent within this fact of the hand grenades, your Honor, is the question that there are not any legitimate uses for hand grenades.

THE COURT: The only reason he gave him the hand grenades was so that Freed could be arrested and charged with a federal offense.

MR. KINNAIRD: Or in a sense, your Honor, we only gave him what he wanted—

THE COURT: The opportunity—

MR. KINNAIRD: The opportunity to—

THE COURT: You didn't give him the hand grenades to do any damage with them, I hope?

MR. KINNAIRD: We certainly did not intend to let them remain that long—

THE COURT: All right, all right.

MR. KINNAIRD: —to do any damage, or to have them fed back.

THE COURT: All right.

MR. KINNAIRD: But the man did have the propensity to want to acquire them. There is no way of knowing if a person is acquiring weapons from underground sources or from a black market, the agent was certainly in a position there of selling himself as one who was able to acquire them, not from the office of Naval Intelligence at least, but you are dealing in a subrosa culture that was attempting to stockpile destructive devices and we merely gave him the opportunity, under a control situation, where we could minimize the danger to society and, we believe, bring the man to justice for the criminal activities that he desired to do. And that was the only point—

THE COURT: You desired to bring him to justice for the thing that he was planning to do, not for the purpose of what he did.

MR. KINNAIRD: He did, because he did take possession of the hand grenades. We gave him the opportunity to do it.

THE COURT: All right.

MR. KINNAIRD: And the other aspect of the charge is of course the conspiracy which is the plan to acquire the grenades.

THE COURT: Let me ask you this question: Let's assume that the—it is against the law in California to have these devices that they are charged with, the hand grenades, there is no question about that.

MR. KINNAIRD: That is correct, no question about that, your Honor.

THE COURT: All right. Now, in order to comply with federal law, in order to comply with the federal law that we are talking about here, it is necessary that there be an application.

MR. KINNAIRD: That is correct, your Honor.

THE COURT: All right. And two people have to—the application has to contain certain information. One is that the transferor has to agree to deliver, and the transferee has to agree to receive.

MR. KINNAIRD: The transferee does not have to—depending on what—

THE COURT: Well, he has to put his fingerprint on it, he has to put his fingerprint on it.

MR. KINNAIRD: Yes.

THE COURT: As soon as he puts his fingerprint on that application, hasn't he violated two sections of the California Penal Code? One is an attempt to obtain a destructive device, and the second is a conspiracy to obtain a destructive device?

MR. KINNAIRD: He probably has, yes, your Honor.

THE COURT: And then Hanes has to apply.

MR. KINNAIRD: Not for the fingerprints—for the fingerprints, your Honor?

THE COURT: Because the Federal law requires that two people conspire—two people agree to transfer a hand grenade from one person to another person. And as soon as the Federal law requires those two people to agree, then they have violated two sections of the California law.

MR. KINNAIRD: You have another provision that comes into effect then.

THE COURT: What is that?

MR. KINNAIRD: The first one—there are two points to your argument and I would like to make the first one.

If we require that they violate State law, they have yet though not—the transferee defendant has not yet incriminated himself in any legal way—

THE COURT: I don't care whether or not he has incriminated himself. The point is the Federal law requires him to conspire to violate the State law when he tries to comply with Federal law.

MR. KINNAIRD: Then I would ask—

THE COURT: A good honest man—not a member or a friend of the Black Panthers—but a good honest decent man. All right? Let's put him in that category.

He says, I want to get a hand grenade because I want to put it up on my mantel to bring back memories of World War II, the time when I was in my glory.

So he goes to somebody and he says, somebody who has a hand grenade, and he says, I can't transfer it to you unless we comply with the Federal registration requirements. And the Federal registration requirement forces those two men to conspire to violate State law.

MR. KINNAIRD: Then I believe the supremacy clause would knock them out of the wire for attempting to de-

velop a State prosecution because they were required to do a certain act to comply with Federal law.

THE COURT: Are you telling me then that the State law that says that you cannot possess a hand grenade is unconstitutional?

MR. KINNAIRD: No, your Honor.

THE COURT: You said so, you said so.

MR. KINNAIRD: I said if you complied—the question that your Honor was posing to me, as I understood it, was that if the Federal law requires a conspiracy violation of the State law it doesn't comply with the Federal law—

THE COURT: Doesn't it? Doesn't it? As a matter of reality, as a matter of practicality, as a matter of everyday common sense, doesn't the Federal law—not pertaining to all firearms or all guns—but in the very narrow context of hand grenades, require two people to conspire to violate State law?

I say it does. And therefore I have to grant the motion. There is no way you can get around that.

MR. KINNAIRD: Well, what is the basis then, your Honor—I mean if you say even if, to satisfy Federal law, it requires a violation of the State law—

THE COURT: He has incriminated himself.

MR. KINNAIRD: He has incriminated himself?

THE COURT: He has incriminated himself because he has conspired, there is evidence of his conspiracy to violate State law.

MR. KINNAIRD: By what statement of his, your Honor, the point—

THE COURT: The fingerprints.

MR. KINNAIRD: Well, the fingerprints are not self-incriminating.

THE COURT: The fact that they have gotten together and agreed.

MR. KINNAIRD: But there is nothing that he says, your Honor, that would indicate, that could be used against him as a testimonial compulsion from himself, and therefore—

THE COURT: You don't have to, you could indict them both for the conspiracy.



MR. KINNAIRD: And make the transferor an unindicted—

THE COURT: Certainly.

MR. KINNAIRD: Certainly. And there is nothing that would indicate here, and the defendant would have no right to assert any statement that he made to the transferor, because that is a statement made by a citizen, not a governmental statement. And therefore it is not self-incriminating. It is only the personal privilege.

THE COURT: His address, his fingerprints, his photograph.

MR. KINNAIRD: He is not saying it to the Government, your Honor. He is not making the representation of his name and address any more than you had in Minor versus Huie. In the situation there it is the transferor's testimony that is coming in against him which would constitute a violation of the law.

THE COURT: Doesn't Hanes say that merely by forcing him to comply with the registration requirements when he raises a defense of self-incrimination is a total and complete defense to the Federal charge? Didn't Hanes say that?

MR. KINNAIRD: Forcing him to comply, forcing him to testify against himself, because the compliance is the evidence, the compliance is a testimonial compulsion, there is no way to correct this situation upon receipt. There isn't any basis to do it. When the statute was drafted they specifically had in mind the Hanes language. And the congressional record makes it quite clear that the statute was drafted to circumvent and get around the self-incriminatory problems that existed in the previous Act.

THE COURT: Except that they forgot the footnote in Hanes, when they drafted the new Act they completely ignored the footnote in Hanes.

The footnote—I have to read them—the footnote 13, page 99, footnote 11 on page 97.

You see, this case is based upon a very narrow set of circumstances, and that is the hand grenades. If California didn't make hand grenades illegal then I think the result would be different.



MR. KINNAIRD: We would basically have just about the same problem as to any other regulatory statute, that is what we would call prohibitive regulatory—

THE COURT: Not the incrimination aspect.

MR. KINNAIRD: Well, then I may address myself to the question of immunity, the immunity provision that is contained in 5848, your Honor. If it is a contemporaneous crime that you are addressing yourself to and 5848 brings in the immunity position which says that no testimony that is derived from—

THE COURT: It doesn't say that. It says no information from the record or application shall be—that is very narrow.

MR. KINNAIRD: No information or evidence—

THE COURT: From—

MR. KINNAIRD: —obtained from an application, registration or records required to be submitted or retained by a natural person in order to comply with any provision of this chapter or regulation issued thereunder, except as provided in (b) be used directly or indirectly as evidence against that person in a criminal proceeding with respect to violation of law occurring prior to or concurrently with—

THE COURT: Yes, I know.

MR. KINNAIRD: Well, I would submit, your Honor, that any act that you would say that would require the commission of a crime—

THE COURT: No, no, no. It doesn't say act, it says any information or evidence from the records or application—

MR. KINNAIRD: Well, then the—

THE COURT: And the mere fact of giving a fingerprint is not evidence obtained from the record, but is an act independent of what the record says.

MR. KINNAIRD: Doesn't the fingerprint have to accompany the registration of transfer order?

THE COURT: Yes, of course.

MR. KINNAIRD: And it would be my interpretation, your Honor, that—

THE COURT: You couldn't use the fingerprints but you could use the testimony of the act of giving the fingerprints. Don't you understand the difference?

MR. KINNAIRD: Only in two ways, your Honor, do I comprehend the difference. One is if they gave the fingerprints in the presence of another person—

THE COURT: Yes.

MR. KINNAIRD: Then that person would be able to testify to that fact.

THE COURT: Yes.

MR. KINNAIRD: And that would be no self-incrimination because that person would be outside, and the personal privilege of self-incrimination would be individual, and that would not be violated.

If there was a third person present, if you were indicting the two of them and they both were on trial and neither could be a witness, then the statute would sufficiently protect them.

If there was a third person present, then that person could testify. And again neither of the two would have any self-incrimination privileges.

So my position on that would be that the self-incrimination privilege does not apply on the hypothetical that you gave because it is not substantial and real, the possibility of self-incrimination, which is the question the Court addressed themselves to in *Minor versus Huie*.

And the conclusion that I stated in the unpublished Tennessee decision in considering the same statute, which I am sorry I didn't have any more information to give your Honor because the thing just didn't give any more information.

But I would submit that in the hypothetical that your Honor poses, and upon which your Honor challenges and obviously is concerned with the constitutionality of this statute, there is not any real possibility of self-incrimination because of the interplay of 5848 and the personal aspect of the privilege against self-incrimination that either there is going to be independent evidence not subject to it, or you are going to have, you are going to have a protected act, because the act and the record are going to be the same. And under either theory there is not any substantial risk against self-incrimination, against the defendant being compelled to incriminate himself.

THE COURT: All right. Let's hear from Mr. Manes.

MR. MANES: First, your Honor, I would make the general observation that there were at pages 12 and 12-a of our response to the motion--

\* \* \*

THE COURT: All right, Mr. Manes.

MR. MANES: Yes, your Honor. Thank you.

I started to say, your Honor, that the point that we have argued on the scienter requirement was stated in our papers, in our response to the Government's opposition papers at pages 12 and 12-a where we stated and argued that the Government agent not only conceived the crime but participated in its commission and was the sole means of determining whether a crime would be committed.

And unless the defendant intended to possess unregistered devices, as a matter of law, I wanted to make that point that we are not coming up with that argument here just at the time of oral presentation.

The second point I wanted to make was in reference to an example that the Government cited to your Honor about the traffic offense where the police officer is chasing a traffic offender through a red light. And of course the difference from this situation is obvious. In the traffic situation the officer hasn't created a crime, he hasn't led the traffic offender through the red light, he is giving chase to an offender, one who has committed an offense in his presence, and he is in no way a participant.

The next point I wanted to make, your Honor, was in reference to, I think the colloquy between your Honor and counsel in the earlier stage of the Government's argument and it could be summed up in the following way: The principle that the Government must conform to its own laws and to its own regulations, the principle that is espoused in a number of the cases, all of which I am sure your Honor is familiar with.

And that principle, I would imagine, certainly would be applicable here, certainly where we look at 5822, Section 5822 of Title 26, and where we—excuse me, I misstated it—it is 5852, Section 5852, we find that, among other things, a series of subsections dealing with the general transfer of weapons and the imposition of tax requirements, in connection with those transfers.

And under Subsection (f) we find, after there has been a Subsection (a), a specific exemption accorded to the United States and departments thereof, we find under Subsection (f) that no firearm may be transferred or made exempt from tax under the provisions of this section, unless the transfer is made or is performed pursuant to an application in such form and manner as the Secretary or his delegate may by regulation prescribe.

And so therefore that law, it seems to me, is as applicable to a law enforcement officer who is acting pursuant to some investigation as it would be to any other transferor under any circumstances.

One more point that I want to make. The Government seems to make the contention that we cannot assert by way of example a standing such as the exemplar that your Honor posed, namely one who finds a grenade on the street. I would respectfully suggest, however, that at least on a motion to dismiss where we are attacking the face of the statute, we do have such a standing. We do have the right to assert and to attack the statute which is defective in a substantial or material aspect, even though not applicable specifically to the facts of this case. And there have been several Supreme Court decisions which have upheld that right, particularly in the area of vagueness.

THE COURT: Well, those are First Amendment cases, they have no applicability here.

MR. MANES: Well, I daresay that it isn't limited to the First Amendment. At least I don't know of any requirement that it is so limited, although it does most frequently appear in those types of cases.

Finally, your Honor, there is a question of course of jeopardy. We attempted to deal with the jeopardy point, your Honor, in our memorandum of points and authorities, beginning at page 6 of the opening memorandum.

Our basic contention was first that the violation here is not such as would necessarily furnish complete information to constitute the basis for a prosecution. It is only necessary that the information furnish a link towards prosecution.

The second point that we would make, of course, is that in three U.S. Code and Administrative News at page 34

and 35 it discusses the history of the Act. It appears quite clear that Congress was intending in the immunity provision to limit it really essentially to prosecution of violations of this particular law. And certainly it does not seem to reach California law—

THE COURT: Read that to me where you picked that up.

MR. MANES: Read that to you.

In Hanes

“\* \* \* all weapons—” wait a minute, let’s see—yes, that is the passage I think that we were referring to, which reads as follows, your Honor:

“In Hanes versus United States,” giving the citation “the Supreme Court held the registration requirement of the existing law constitutionally unenforceable because it requires registration almost exclusively by those in illegal possession of a weapon and made this information available to prosecute them for illegal possession. The Senate amendment avoids this problem by extending the registration obligation to all possessors of the weapons, legitimate or otherwise, and by providing that registration information may not be used directly or indirectly to prosecute a natural person for an offense prior to or concurrent with this registration.”

But as I read that—

THE COURT: The immunity doesn’t slop over to State requirements.

MR. MANES: Conceivably what I have just read doesn’t say we are just limiting this to the statute. I read that in the statute.

I must confess that on rereading it it doesn’t seem as clear as when I first looked at it. But I would respectfully suggest also that if this was meant to deal with the Hanes problem, I think the immunity statute does not expressly preclude the possibility that information provided from an affidavit, or from other sources required by the Secretary can be used, at least to furnish a link in a charge of conspiracy, of conspiring to attempt to violate State law with regard to possession.

And that of course if the problem with which we are basically confronted so far as the immunity is concerned. I just don't think it is broad enough. It doesn't preclude specifically anything about the State. And I think that we come within the terms of *Marquette*, 390 U.S. 39, where the Court in language makes it clear that the statute granting immunity has to be very precise and specific.

THE COURT: What page?

MR. MANES: At page 39.

THE COURT: What page says that?

MR. MANES: At page 53 through 54. I can read it to your Honor.

THE COURT: No, I have it here. Go ahead.

MR. MANES: Finally I want to go back to a question that your Honor posed to me very early in our original argument when your Honor asked us about the information that was required of a transferee.

I believe under Section 5822 that the information required must include, but is not limited to, fingerprints and photographs. And as a matter of fact, as I earlier pointed out, there are regulations in existence which seem to require more than simply the fingerprints and the photographs and the address, specifically they require an affidavit of necessity, which means of course exposure, I would assume, not just simply a desire of possession, but an indication of the purpose of such a possession, which would furnish, among other things, possibly information to violate the perjury statute.

I submit it, your Honor.

THE COURT: Anything else, Mr. Kinnaird?

MR. KINNAIRD: Just one or two points, your Honor.

The only point, your Honor, in explanation to the preparation on the entrapment question which your Honor has considered and we have discussed at great length. I didn't receive their papers until today and I just haven't had an opportunity to research that.

If your Honor is inclined to make a ruling that because there was not a qualified transfer by the Secretary of the Treasury and therefore under an extension or adoption or whatever it may be called in this case, of the exclu-

sionary rule, we are going to dismiss the indictment, I would like to first have an opportunity to fairly and sensibly brief this, because in several respects—

THE COURT: No, I am not going to—I am going to grant the motion but I am not going to dismiss the indictment on that ground, Mr. Kinnaird.

MR. KINNAIRD: Then obviously we must be talking about the self-incrimination question.

THE COURT: Well, talking about the elements, the necessity of the indictment setting forth the elements of the crime, which the Court feels must include, one, knowledgeable possession; and, two, a knowledge of the character of device; and three, knowledge that it had not been transferred on the register.

MR. KINNAIRD: May I go to two points on that, your Honor.

First, as to the question of knowledgeable possession and knowledge of the character of what had been received, knowledge of the object itself. I believe the defendant—I believe that the case law supports it, and recent support of the word “possession,” meaning knowing possession. I respectfully submit that in the case that we have cited, the Baker case in our brief, the entire concept of the use of the term “possession” means that the person has knowing possession, that he knows that he possesses it, to-wit, the hand grenade, he has hand grenades in his possession. That unequivocally is our burden.

As far as the elements of the offense, it is an element that is in the indictment by the term “possession” itself. I mean if I really was concerned, your Honor, I could add the term—

THE COURT: There would not be any problem.

MR. KINNAIRD: Well, to say knowingly possess—but I don’t believe that that would be the basic question that your Honor is addressing himself to.

THE COURT: No, I indicated that in my opinion, based upon the vignettes that I gave you, walking down the street and finding a hand grenade, there is no question that even if knowing possession were placed in the indictment, that that still would not cure the problem of the scienter that I am talking about.



MR. KINNAIRD: And then on the question of scienter, your Honor, of course we have boiled it down to the basic question, I mean—also, your Honor desires to posture this in the clearest fashion that we possibly can so that we know that with which we have to cope as the time goes down the road.

If we are talking specifically of a scienter requirement, I would have to take the position, your Honor, that even in the hypothetical that you gave, and as I changed after I had a moment to think about it, the man would basically be guilty, yes. It may shock one's conscience to say that. But you are taking a situation where there is a duty on a person not to take possession of certain types of items period, whether they are on the street or not, means that he had better leave them alone. You have a—

THE COURT: In other words, let's not get involved.

MR. KINNAIRD: Basically that would be the position. Or if you do get involved, rest yourself upon the discretion that is built within the administration of the law from the prosecutor's angle, not to be concerned about it, I mean to give you the alternative which would be—

THE COURT: You see, it is strange. In the heroin law—and there is nothing more hideous or horrible than heroin—you have got a right to explain your possession.

MR. KINNAIRD: But possession there only overcomes one of the regulatory elements of the crime itself, which is giving the presumption to show that it was imported contrary to law, but you always have—

THE COURT: Yes, but anyway the law gives, for whatever reason the law gives you the right to explain your possession, it gives you a right to explain your possession. And if you can explain your possession satisfactorily to the jury you are not guilty.

MR. KINNAIRD: But you would still be guilty in the State Court if you gave the same explanation of your possession.

THE COURT: You would still be guilty, certainly.

MR. KINNAIRD: But you would not be guilty of importing heroin contrary to law.

THE COURT: That's right. That is the question.



MR. KINNAIRD: Whereas here we are specifically concerned with the possession itself. And I would like to say one thing. There has been a point made which I believe to a degree has permeated your Honor's thinking on this, which is the Lambert case and the basic inequities that—

THE COURT: No, no, I don't think Lambert is appropos whatsoever.

MR. KINNAIRD: I think it is a notice case, and I think we have the notice by the hand grenades.

THE COURT: Yes.

MR. KINNAIRD: But on the scienter requirement then I address myself exclusively, your Honor, to the overwhelming number of cases that we have cited at length in our brief and I am sure I could cite more where this question has been raised and raised and raised in connection with a regulatory statute of this type.

And the Ninth Circuit has held with us, I believe, and the Tenth Circuit, and I know of no cases that go contrary to this position on basically identical statutes of which we have only made a statutory amendment and set it into the old legislative scheme.

Now if your Honor—

THE COURT: Well, in the final analysis, when you read Justice Jackson's argument, and when you read his opinion, and when you boil it down he says that you have to determine the elements of scienter on the basis of, almost on a case-to-case basis. There is just no rule of thumb.

And I say that in this case—we might as well close it off, because we could argue it back and forth, and once I decide the case and you want to talk to me we will talk over a cup of coffee.

I am going to grant the motion to dismiss the indictment on the following grounds:

One. I don't believe that the statute cures the defects as pointed out in Hanes by reason of the fact that the law in California makes it a felony to possess hand grenades or destructive devices of the type as alleged in the Information. The law in California makes it a felony to conspire to possess destructive devices of the nature and

type as set forth in the Indictment; and the law in California makes it a felony to attempt to possess destructive devices of the type set forth in the Indictment.

And secondly, the Information is defective because the Information does not set forth the necessary elements of sante, which I believe is required in order to effect due process within the framework of the facts, of the admitted facts in this case: One, that the police officer deliberately and intentionally obtained hand grenades from the Department of the Navy, and then transferred those hand grenades to the defendant, knowing that the hand grenades had not been—without the right to transfer those hand grenades, without the approval of the Secretary of the Treasury as set forth in the Act of which the defendants are charged.

This will give you the right, Mr. Kinnaird, to appeal, of course, to the Supreme Court.

MR. KINNAIRD: Yes.

THE COURT: And give the Government the opportunity to fully explore the full aspects of this Act. It should provide a helpful means to the lower courts to determine what the opinion of the Supreme Court is.

MR. KINNAIRD: May your Honor stay the execution of this order for seven days so I can consult with all of my higher—

THE COURT: Oh, of course, of course.

I will suspend the execution of the effectiveness of the order—I will do this, Mr. Kinnaird:

The court will direct the preparation of the order of dismissal by Mr. Manes to be submitted to the court on February 27th, 1970 at 1:30 p.m. in this courtroom.

MR. MANES: Would your Honor order transcript of your Honor's decision?

THE COURT: No. Your clients are not indigent.

MR. MANES: Very good.

THE COURT: Are they?

MR. MANES: No.

THE COURT: Somebody gave \$20,000.00 in cash to somebody.

MR. MANES: No, that was a mistake, as we learned later.

THE COURT: Anyway, they are not indigent.

MR. MANES: No, they are not.

THE COURT: February 27th, is that satisfactory?

MR. MANES: Satisfactory.

THE COURT: That will be on calendar.

MR. KINNAIRD: Now, may I just, for clarification, your Honor, when I have to talk to these folks that I work for—your Honor is not making any part of your holding for the lack of putting in the words “knowingly possessed”—

THE COURT: No.

MR. KINNAIRD: —you construe “possess” as meaning “knowingly possessed,” as we argued?

THE COURT: Yes, yes.

MR. KINNAIRD: Thank you.

THE COURT: Yes. It has to be—you have to have more than that in there.

MR. KINNAIRD: But we are strictly on the intent question, that it must be alleged and proven.

THE COURT: Yes.

MR. KINNAIRD: As the scienter requires.

THE COURT: Yes.

MR. KINNAIRD: Which we all understand to mean a criminal intent, in this case knowledge that it wasn't registered.

THE COURT: Yes. Specific intent, knowledge it wasn't registered.

\* \* \* \*

[Filed March 10, 1970]

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

No. 4846-Cr. (WJF)

UNITED STATES OF AMERICA, PLAINTIFF

v.

DONALD FREED, SHIRLEY JEAN SUTHERLAND, DEFENDANTS

ORDER OF DISMISSAL OF INDICTMENT

The motion of the above named defendants, Donald Freed and Shirley Jean Sutherland, to dismiss the indictment in the within cause came on for hearing on February 16, 1970, in the United States District Court for the Central District of California, Hon. Warren J. Ferguson, Judge Presiding.

Plaintiff appeared by its attorneys, Wm. Matthew Byrne, Jr., United States Attorney, by Dennis Kinnaird, Assistant United States Attorney.

Defendant Freed appeared by his attorney, Hugh R. Manes, Esq.; defendant Sutherland appeared by her attorney, Luke McKissack, Esq.

The Court, having read and considered the motions, responsive papers and memoranda of law of the respective parties on trial herein, and having heard and considered the oral arguments presented by their respective counsel, and the cause having been submitted for decision, hereby makes the following findings, conclusions and orders, to wit:

One: Count I of the indictment herein, charging defendants with knowing and wilful conspiracy to possess unregistered destructive devices in violation of 26 U.S.C. § 5861(d) offends due process of law by failing to allege the requisite element of scienter in connection with such alleged possession, that is, that defendants knowingly and intentionally conspired to possess destructive devices with

knowledge that such devices were or would be unregistered.

Second: Count II of said indictment, charging defendant Freed with possession, and defendant Sutherland with aiding and abetting such possession of unregistered destructive devices likewise violates due process of law by failing to allege the requisite element of scienter in connection with such alleged possession, that is, that defendant Freed possessed, and defendant Sutherland aided and abetted his alleged possession of destructive devices with knowledge and intent that the same were unregistered.

Third: 26 U.S.C. § 5861(d), and 26 U.S.C. § 5841(c), which statutes the indictment accuses defendants of violating, are unconstitutional in that compliance by the accused with the latter statute, 26 U.S.C. § 5841(c), and the regulations promulgated thereunder, would compel the accused to furnish to the government, through its agent, information tending to incriminate him or her under the laws of the State of California, and particularly, California Penal Code Sections 12301 and 182, which make the mere possession and conspiracy to possess destructive devices a felony, whether or not registered with the Secretary of the Treasury.

For each of the foregoing reasons, therefore:

IT IS HEREBY ORDERED that the Indictment herein, and each count thereof, be and the same hereby are dismissed.

DATED: March 10, 1970

/s/ W. J. Ferguson  
Judge of the United States  
District Court

[Filed April 7, 1970]

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

No. 4846-CD

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

DONALD FREED, SHIRLEY JEAN SUTHERLAND, DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT  
OF THE UNITED STATES

1. Notice is hereby given that the United States of America, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order dismissing the indictment entered in this action on March 10, 1970.

This appeal is taken pursuant to 18 U.S.C. Section 3731.

2. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

Complaint

Indictment

Notice of Motion to Dismiss Indictment

Opposition to Motion to Dismiss

Reply to Opposition to Motion to Dismiss

Order of Dismissal of Indictment

Transcript of Proceedings on February 16, 1970

Notice of Appeal

3. The following questions are presented by this appeal:

(1) Does Count One of the indictment herein, charging defendants with knowing and wilful conspiracy to possess unregistered destructive devices in violation of 26 U.S.C. § 5861(d) offend due process of law by failing

to allege the requisite element of scienter in connection with such alleged possession, that is, that defendants knowingly and intentionally conspired to possess destructive devices with knowledge that such devices were or would be unregistered?

(2) Does Count Two of the said indictment, charging defendant Freed with possession, and defendant Sutherland with aiding and abetting such possession of unregistered destructive devices likewise violate due process of law by failing to allege the requisite element of scienter in connection with such alleged possession, that is, that defendant Freed possessed, and defendant Sutherland aided and abetted his alleged possession of destructive devices with knowledge and intent that the same were unregistered?

(3) Are Sections 5861(d) and 5841(c) of Title 26 unconstitutional in that compliance by the accused with the latter statute, 26 U.S.C. § 5841(c), and the regulations promulgated thereunder, would compel the accused to furnish to the government, through its agent, information tending to incriminate him or her under the laws of the State of California, and particularly, California Penal Code Sections 12301 and 182, which make the mere possession and conspiracy to possess destructive devices a felony, whether or not registered with the Secretary of the Treasury?

Respectfully submitted,

WM. MATTHEW BYRNE, JR.  
United States Attorney

ROBERT L. BROSIO  
Assistant United States Attorney  
Chief, Criminal Division

/s/ DENNIS E. KINNAIRD  
DENNIS E. KINNAIRD  
Assistant United States Attorney  
Attorneys for Plaintiff  
United States of America

## SUPREME COURT OF THE UNITED STATES

No. 345, October Term, 1970

UNITED STATES, APPELLANT

*v.*

DONALD FREED and SHIRLEY JEAN SUTHERLAND

ORDER NOTING PROBABLE JURISDICTION—  
FILED OCT. 19, 1970

APPEAL from the United States District Court for the Central District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.